Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

David Gene Elford, *Petitioner*,

-- vs. --

Wanda Lucille Elford, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. IN A HEARING INVOLVING A DIVORCED SPOUSE'S ENTITLEMENT TO MAINTENANCE PAYMENTS INVOLVING RAILROAD RETIREMENT ACT TIER I AND TIER II BENEFITS, IS THE SUPREMACY CLAUSE VIOLATED BY A STATE COURT'S INTERPRETATION OF THE RAILROAD RETIREMENT ACT AND A CONTRACT EXECUTED AFTER THE PARTIES' DIVORCE THAT IS CONTRARY TO THE RAILROAD RETIREMENT ACT?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David Gene Elford, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Washington, which denied review on July 27, 1994.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is unofficially reported at In re the Marriage of Elford, No. 61599-3 (Wash. July 27, 1994) (mem). A copy of the Court's decision is located in the Appendix at A-11.

A copy of the Ruling Affirming Judgment, filed by the Court of Appeals, State of Washington, Division II, No. 15502-8-II, is in the Appendix at A-1 through A-9.

A copy of the Order Denying [Petitioner's] Motion to Modify, filed by Division

II on February 7, 1994, is in the Appendix at A-10.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioner seeks review of the judgment of the Supreme Court of the State of Washington entitled In re the Marriage of Elford, No. 61599-3 (Wash. July 27, 1994) (mem) denying review of the Ruling Affirming Judgment of the Court of Appeals, State of Washington, Division II, No. 15502-8-II (Wash. App. December 14, 1993). Petitioner had timely filed a motion to modify the Commissioner's ruling which was denied by Division II on February 7, 1994. The courts of the State of Washington had general jurisdiction to the review the litigation because the cause of action originated as a dissolution action under Title 26.09 of the Revised Code of Washington. This Court has jurisdiction of

this petition under 28 U.S.C. § 1257 (198-9).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 45, United States Code, Section 231m:

> (a) Except as provided in subsection (b) of this section and the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated

(b)(1) This section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 231a(b) of this title from income tax pursuant to the Federal income tax provisions of the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.].

(2) This section shall not operate to prohibit the characterization or treatment of that portion of an annuity under this subchapter which is not computed under section 231b(a), 231c(a), or 231c(f) of this title, or any portion of a supplemental annuity under this subchapter, as community property for the purposes of, or property subject to, distribution in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree. The Board shall make payments of such portions in accordance with any such characterization or treatment or any such decree or settlement.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the Supreme Court of the State of Washington's denial

of review of a Ruling Affirming Judgment of the Superior Court of the State of Washington, Clark County.

B. Course of Proceedings.

David Gene Elford ("David") and Wanda Lucille Elford ("Wanda") were married on December 31, 1950. (Findings of Fact and Conclusions of Law, ¶ 3.) David retired under a disability retirement pursuant to the Railroad Retirement Act effective September 27, 1980. (RP 6.)[1] David was almost fifty-two years old at the time of his retirement. (RP 13.) David's disability retirement was based on at least twenty years of service and a current disability from railroad occupation. (RP

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[1]The abbreviation "RP ---" designates the Verbatim Report of Proceedings from the hearing held before the Superior Court of the State of Washington, Clark County on September 16, 1991.

18.) David has been continuously qualified by the Railroad Retirement Board under a disability retirement since that time. (RP 6.) Once David had qualified for retirement under a disability, there would be no change in his benefit level even when he subsequently would qualify for retirement based on a combination of his years and service and his chronological age. (RP 8.)

David and Wanda separated on May 18, 1983. (Findings of Fact and Conclusions of Law, ¶ 4.) The marriage of David and Wanda was dissolved by decree of the Superior Court of Clark County on September 19, 1983. (CP 15.)[2] Both Wanda and David were represented by a single attorney.

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[2]The abbreviation "CP ---" designates the Clerk's Papers from the Superior Court of the State of Washington, Clark County file for Cause Number 83-3-01032.

(RP 44.) Wanda and David had their attorney draft a Separation Contract (CP 5) which was executed by them before a notary in Vancouver, Washington on June 9, 1983. (CP 97, Finding of Fact 2.) The Separation Contract was incorporated into the Decree of Dissolution of Marriage (CP 15, ¶¶ 5-7). The Separation Contract was also incorporated by reference into the Findings of Fact and Conclusions of Law supporting the decree. (Findings of Fact and Conclusions of Law, ¶¶ 7-10.)

The Separation Contract provided for the distribution of David's Railroad Retirement Act benefits as follows:

> 2.1 All of the property and liabilities of the parties shall be distributed as set forth below. The parties agree that, although the fair market value is not set forth for each item of property or obligation, they are satisfied that the below mentioned distribution is an

equitable distribution. All are the community property and obligations of the parties unless otherwise identified.

a. The husband is awarded as his sole and separate property the following:

. . .

8.) One half of husband's retirement received as a result of his Railroad Retirement Pension, which is valued at approximately $911.88 month (one half-share being approximately 455.50 at the present time.)

. . .

The wife does hereby quit claim her interest in the above to the husband, subject to all taxes, encumbrances, reservations and restrictions of record or knowledge of both parties. (CP 5 at 2)

b. The wife is awarded as her sole and separate property the following:

. . .

12.) One half of husband's monthly retirement received

> as a result of his Railroad Retirement Pension, which is valued at approximately $911.88 month (one half-share being approximately 455.50, at the present time); provided that payments to the wife of this benefit shall cease upon her remarriage.
>
> The husband does hereby quit claim his interest in the above to the wife; subject to all taxes, encumbrances, reservations and restrictions of record or knowledge of both parties. (CP 5 at 3)

The Findings of Fact and Conclusions of Law supporting the Decree of Dissolution of Marriage (CP 15) denominated the $455.50 monthly payment to Wanda as maintenance. (Findings of Fact and Conclusions of Law, ¶ 10.)

Both when the Separation Contract was executed and when the Decree of Dissolution of Marriage was entered, David was receiving railroad retirement benefits.

Following the entry of the Decree of Dissolution of Marriage, David complied with the Separation Contract and equally divided his monthly disability payments with Wanda. As a result, Wanda received approximately $455 per month until April of 1985.

In 1985, David approached Wanda with a proposal that he buy out Wanda's interest in certain real estate described in the Separation Contract. Both David and Wanda agreed that the real estate was worth $180,000 (RP 28.) David agreed to buy-out Wanda's share of $90,000 in the property. (RP 28.) David then prepared a document called "Separate Agreement" which was executed by the parties on April 24,

1985. (CP 24; Ex. 2.)[3] The "Separate Agreement" also had the following provision, entitled "Medical Retirement Relinquishment Agreement", with respect to David's Railroad Retirement Act benefits:

> I, Wanda Elford, being of sound mind & body and of my own free will hereby agree that on this 24th day of April, 1985, AND FOR ALL RELINQUISH ANY AND ALL CLAIM TO HALF OF DAVID G. ELFORD'S MEDICAL RETIREMENT. THIS AGREEMENT IS MADE THROUGH LOVE AND AFFECTION AND DIVISION OF BOTH PARTIES HOLDINGS TO BOTH PARTIES SATISFACTION.

(CP 24; Ex. 2.) "Medical retirement" is not a defined term under the Railroad

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[3]The record reflects that the "Separate Agreement" was also offered and admitted as Plaintiff's Exhibit 1. (RP 12.) Ms. Freres letter to Wanda was also offered as Plaintiff's Exhibit 1. (RP 4-5.) Based on the next exhibit, offered by Wanda, which used the number three, the "Separate Agreement" should correctly be denominated as Exhibit 2. (See RP 16-17.) Later, the "Separate Agreement" is correctly referred to as Exhibit 2. (RP 25.)

Retirement Act. (RP 18.) The testimony of Ms. Freres, a Railroad Retirement Board employee, indicates that it is a layperson's term for an occupational disability retirement. (RP 18-19.) After executing the "Separate Agreement," David made no more payments to Wanda out of his Railroad Retirement Act benefits. (RP 29.)

In May of 1991, a little over six years later, Wanda inquired into David's Railroad Retirement Act benefits by contacting Ann Marie Freres, a contact representative employed by the Railroad Retirement Board in Portland, Oregon. (RP 8.) Wanda gave Ms. Freres a copy of the Separation Contract and a copy Decree of Dissolution of Marriage. (RP 9.) Wanda did not discuss the "Separate Agreement" with Ms. Freres. (RP 11.) Wanda also did not

give Ms. Freres a copy of the "Separate Agreement." (RP 11.)

Ms. Freres prepared a letter for Wanda which indicated that David was entitled to a total monthly benefit of $1,169.15. (Ex. 1; RP 4-5.) The letter subdivided the $1,169.15 into two components: a non-divisible Tier I benefit of $867.00; and a divisible Tier II benefit of $302.15. (Ex. 1.)

Starting with June of 1991, the Railroad Retirement Board began to distribute to Wanda, at her request, one-half of David's Tier II Railroad Retirement Act benefits. (RP 30.) This distribution was accomplished by a garnishment of David's Tier II benefits. (RP 30.) The Railroad Retirement Board based its decision to award Wanda one-half of David's Tier II benefits on a determination that the De-

cree of Dissolution of Marriage awarded her a community property share in the Tier II benefits. (RP 11.) One-half of David's Tier II benefits amounted to a payment to Wanda of approximately $151 per month. (RP 30.)

When David's Tier II Railroad Retirement Act benefits were garnished by the Railroad Retirement Board to pay Wanda $151 per month, David met with Ms. Freres on July 10, 1991. (RP 11-12.) David showed Ms. Freres a copy of the "Separate Agreement." (RP 12.) Ms. Freres advised David that the Railroad Retirement Board would only honor a court order. (RP 12.)

David then retained counsel and filed a Motion for Modification of Dissolution. (CP 20.) On July 30, 1991, Wanda filed a Response and Countermotion claiming: the court had no jurisdiction to modify the

property distribution; denied that Wanda had intended to relinquish all of her rights to all of David's Railroad Retirement Act benefits; and requested attorney's fees. (CP 40.)

On August 2, 1991, the superior court treated the motion as a motion to vacate under Superior Court Civil Rule 60(b)(6) [similar to Fed. R. Civ. P. 60], found it had jurisdiction to hear the matter, and scheduled a hearing for September 16, 1991.[4] The Friday previous to the hearing date, David filed a memorandum suggesting that there had been mutual mistake between David and Wanda over the Separate Agree-

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[4]David's appeal of the denial of the motion to vacate was pursued by him pro se. No verbatim report of the proceedings for the August 2, 1991 hearing is available to Petitioner's attorney. As such, Petitioner relies on the Statement of the Case in Respondent's Brief for the Court of Appeals, Division II.

ment. (RP 2-3.) Shortly before the hearing, Wanda filed an Amended Response and Countermotion. (CP 55.) Counsel for David did not object to the filing. (RP 3.)

At the hearing, David presented the testimony of two witnesses in support of the motion to vacate: Ms. Freres (RP 3-19) and David. (RP 19-43; 63-65.) Wanda also presented the testimony of two witnesses in opposition to the motion to vacate: Wanda (RP 43-60; 66-67) and Monte Elford, one of David and Wanda's children. (RP 60-62.) After considering the testimony, pleadings, and exhibits, the superior court denied the David's motion to vacate. (RP 83.)

The superior court's oral opinion held that the "Separate Agreement" of April 24, 1985 was enforceable. (RP 80.)

It remained for the court, to determine the intent of David and Wanda at the time of the execution of the "Separate Agreement." (RP 79-80.)

The court found that "[David] testified there was a distinction between medical and regular disability pension." (RP 80.) The court also found that Wanda had established:

> . . . that the medical pension, the medical disability was not a sure thing. It's something that could have been lost if he had been discovered working or if he gained his health back.

(RP 80.) The court concluded from this that Wanda was just giving up her claim to the medical pension. (RP 80.) Supporting this view, the Court analyzed the bargain Wanda had struck with David and found that it was a bad bargain for Wanda because "he

gave her nothing for $5400 a year." (RP 81.)

The court acknowledged the contrary testimony of Ms. Freres that there was no distinction between "medical disability", a "disability pension", or a "regular pension" under the Railroad Retirement Act. (RP 81.) Nevertheless, the court disregard this testimony holding that the intent of the parties was pre-eminent:

> From the Railroad Retirement Act standpoint it is, but that is not what we're talking about. We're talking about the intent of the parties when they contracted.

(RP 81-82.) The court therefore concluded that Wanda was entitled to one-half of the Tier II benefits. (RP 82.)

On October 11, 1991, David appeared without counsel and made a motion that the superior court treated as a Motion for a

New Trial under Superior Court Civil Rule 59 [similar to Fed. R. Civ. P. 59]. (RP II at 1.)[5] Later, at the hearing held on October 25, 1991, the court treated the motion as a Motion to Reconsider, presumably under Superior Court Civil Rule 59. (RP III at 1.) David had retained new counsel, and she proposed to introduce new evidence and testimony in support of the Motion to Reconsider. (RP III at 1.) David proposed to introduce five new documents in support of the motion: (1) a bill of sale for the mobile home (RP III at 2); (2) a release of Federal Employee Liability Act (FELA) claims in favor of Burlington Northern Railroad dated May 13,

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[5]The Verbatim Report of Proceedings for October 11, 1991 will be denominated as RP II at --- to avoid confusion. The Verbatim Report of Proceedings for October 25, 1991 will be denominated as RP III at ---.

1981 (RP III at 3); (3) a September 1983 agreement between David and Wanda conditioning receipt of the medical retirement payment by Wanda on the real estate remaining unsold (RP III at 4-5); (4) a bill of sale dated March 14, 1985 disposing of David's 1976 Kenworth truck (RP III at 5); and (5) the articles of incorporation for Elford Inc. (RP III at 5.) The court denied the Motion to Reconsider without considering any of the new evidence. (RP III at 14.)

Counsel for David objected to several of the proposed findings of fact from the September 16, 1991 hearing. (RP III at 17-20.) Counsel for David specifically challenged the finding that David and Wanda understood the term "medical retirement" to mean "medical disability." (RP III at 19.) Counsel for David also

specifically objected to the finding that both David and Wanda anticipated that David's disability retirement pay might terminate. (RP III at 19.) Finally, Counsel for David objected to the proposed award of attorney's fees on the grounds that Wanda had not adequately established insufficient assets to pay. (RP III at 20.) The court entered the findings of fact proposed by Wanda without modification. (RP III at 25.)

David appealed pro se to the Court of Appeals, Division II and his appeal was timely. (A-4.) David's pro se brief did not specifically designate challenged findings of fact. (A-4.) Challenges the Court of Appeals recognized include: (1) the "Separate Agreement" (Ex. 2) was intended to convey all of David's Railroad Retirement Act benefits to him (A-4); and

(2) the trial court erred in finding that there were two types of retirement which were to be distributed separately. (A-5.)

The Court of Appeals decided the appeal on a motion on the merits and affirmed the superior court. (A-8.) David's motion to modify the commissioner's ruling was denied on February 7, 1994. (A-10.)

A Petition for Review was timely filed on March 9, 1994. On July 27, 1994, the Supreme Court of the State of Washington denied review. (A-11.)

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. THE SUPERIOR COURT VIOLATED THE SUPREMACY CLAUSE WHEN ITS CHARACTERIZATION OF DAVID'S RAILROAD RETIREMENT ACT BENEFITS EXPRESSLY AND DIRECTLY CONTRADICTED FEDERAL LAW.

A. Washington Law is in Conflict with the Railroad Retirement Act Because It Allows the Existence and Extent of Tier I Benefits to be Considered in Reaching a Just and Equitable Division of a Couple's Property.

Washington Law is now in conflict with the law in five other states. See Sup. Ct. R. 10.1(b). The Court of Appeals of the State of Washington, Division II held in In re the Marriage of Roark, 34 Wash. App. 252, 659 P.2d 1133 (1983) that In re the Marriage of Dessauer, 97 Wash. 2d 831, 650 P.2d 1099 (1982) supported the proposition that railroad retire benefits, while not divisible, can be considered as an economic circumstance in the

equitable division of property in a dissolution. Roark, 34 Wash. App. at 255.[6]

However, the Supreme Court of Appeals of West Virginia noted that this is contrary to the law of several jurisdictions including West Virginia, Texas, Pennsylvania, North Dakota, Michigan, Montana, Wisconsin, and Oregon:

> In Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979), the United States Supreme Court held that § 231m prohibited the division of benefits payable under the Railroad Retirement Act by a state court in a divorce. See LaRue v. LaRue, 172 W. Va. 158, 304 S.E.2d 312, 331 (1983) (Neely, J. concurring); Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979); Padezanin v. Padez-

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[6]The Roark court probably stretched Dessauer a little too far since Congressional amendments to the military pension system were far more extensive (and liberal) than the modest amendments to 45 U.S.C. § 231m (1989). Compare with 10 U.S.C. § 1408(c) (1989) (and as subsequently amended).

anin, 341 Pa. Super. 26, 491 A.2d 130 (1985); Belt v. Belt, 398 N.W.2d 737 (N.D. 1987); Larango v. Larango, 93 Wash. 2d 460, 610 P.2d 907, 908 (1980); Kendall v. Kendall, 106 Mich. App. 240, 307 N.W.2d 457, 458-59 (1981); In re the Marriage of Knudson, 186 Mont. 8, 606 P.2d 130, 131 (1980); Rommelfanger v. Rommelfanger, 114 Wis. 2d 175, 337 N.W.2d 851, 853 (Ct. App. 1983); Matter of Marriage of Swan, 301 Or. 167, 720 P.2d 747 (1986). But see In re Marriage of Roark, 34 Wash. App. 252, 659 P.2d 1133, 1135 (1983) (allowing the railroad retirement benefits to be considered as an "economic circumstance" of the parties when apportioning community property in a divorce) construed in, In re Marriage of Bishop, 46 Wash. App. 198, 729 P.2d 647, 650 (1986).

McGraw v. McGraw, 411 S.E.2d 256, 258 (W. Va. 1991). The McGraw Court held that federal law continues to "exclude[] Tier I benefits from consideration as divisible marital property" even after the amendment of 45 U.S.C. § 231m that occurred in 1983. 411 S.E.2d at 258.

The Court of Appeals of Kentucky concurs with the McGraw Court:

> However, disability [Tier I] benefits were specifically exempted from this change [to 45 U.S.C. § 231m]--the states are still prohibited from considering disability annuity payments in dividing the marital estate. See 45 U.S.C.S. 231m. The apparent intent is to make sure that disability benefits go only to the injured worker. This intent will be defeated if courts allow payments to be seized in whole or in part after payment.

Elkins v. Elkins, 854 S.W.2d 787, 789 (Ky. App. 1993). The weight of authority in every jurisdiction, except Washington, supports the proposition that Tier I benefits remain indivisible and that Tier I benefits may not be used in reaching a property division between two parties in a divorce. Roark is contrary to the prevailing state law, and contrary to the Rail-

road Retirement Act. This Court should strike Roark down.

B. The Washington Courts Implicitly Rely on Tier I Benefits in Awarding One-Half of Petitioner's Tier II Benefits to Respondent Under the Post-Divorce "Separate Agreement" Executed by the Parties.

In David's case, the superior court divided his railroad retirement benefits with Wanda. Wanda's rights to the disability benefit (Tier I) were never in doubt--45 U.S.C. § 231m (1989) prohibits any court from reaching the disability benefit. The only benefits on the table were the Tier II benefits--the benefits computed based on railroad service alone. See 45 U.S.C. §§ 231a(a)(1) and 231b(b)(1989). Wanda could not relinquish rights in the Tier I benefits precisely because she never had a legal entitlement to receive any part of them. See Kamel v.

Kamel, 721 S.W.2d 450, 453 (Tex. App.--Tyler 1986); Belt, 398 N.W.2d at 739. Under this correct view of the applicable federal law, it is very difficult indeed to see how the superior court could hold that the parties intended the "Separate Agreement" to waive Wanda's right to funds she was never entitled to receive.

The Clark County Superior Court did not expressly divided David's Tier I benefits--there simply is no authority in any jurisdiction to do this. But David's Tier I benefits did play a pivotal role in the superior court's decision:

> So the issue is was she giving up her claim to the pension forever [in the "Separate Agreement"] or was she giving up just a claim to the medical pension.
>
> I would have to say just the latter, and the reason is simple, Counsel: she was receiving $5400 a year as far as the medical pension was concerned. $450 a month. She gave

> up [in the "Separate Agreement"] for this exchange any rights to that for $10,500 worth of a questionable claim. . . .. So he gave her nothing for $5400 a year.

(RP 80-81.) (emphasis added). The $450 per month the court is referring to was one-half of David's combined Tier I and Tier II benefits that David was paying in accordance with the Separation Contract incorporated into the divorce decree. (CP 15.) It is clear that under either the pre- or post-1983 versions of 45 U.S.C. § 231m, the division of David's Tier I benefits was contrary to federal law. Yet, this is what was ordered by the court in the divorce.

Moreover, the existence of Tier I benefits may not be used to as a factor or circumstance to influence the property distribution between the parties. Belt,

398 N.W.2d at 739 (necessary to remand property division because it was based on an error of law in including the value of Tier I benefits).

Nevertheless, the superior court balanced Wanda's loss of what was predominantly a maintenance payment from Tier I funds, funds to which she never had a legal entitlement, and found that the loss of these payments justified construing the "Separate Agreement" as not waving her right to the balance of David's railroad retirement benefits. In essence, the superior court concluded that there was a failure of consideration in the "Separate Agreement" when the Tier I maintenance payment is compared with an arguably valueless claim.

This reasoning process is particularly strained because Wanda had not been

receiving these payments for over six years from April of 1985 to May of 1991. (RP 29.) In addition, Wanda never had any right to a single dollar of David's Tier I benefits. See 45 U.S.C. § 231m. The fact that she received just over six years of maintenance payments flowing from one-half of David's Tier I funds is in itself a mystery explainable only by David and Wanda's initial counsel--who was apparently just as ignorant as they were as to the indivisibility of David's Tier I benefits. (See RP 44.)

Just as with the Belt case, the superior court's division of David's Tier II benefits should be struck down.

C. The Superior Court Committed Reversible Error When It Did Not Give Due Deference to the Railroad Retirement Board Witness's Correct Interpretation of Railroad Retirement Law.

The superior court committed reversible error when it categorized David's disability retirement benefit as "temporary." First, the uncontroverted testimony of Ms. Freres, a Railroad Retirement Board employee, establishes that David had been continuously on disability retirement status since September 1980. (RP 6.) The doctrine of primary jurisdiction grants exclusive original jurisdiction to the Railroad Retirement Board to make retirement eligibility decisions. See Texas & Pacific R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). By not invoking primary jurisdiction and instead independently determining David's retirement eligibility, the superior court was not

giving due deference to the Railroad Retirement Board's expertise and authority. This compounded the court's error in relying on the pre-"Separate Agreement" distribution of Tier I benefits because it distorted the true nature of Tier I benefits beyond recognition.

The exception to the doctrine of primary jurisdiction, when a court is engaged in a purely interpretive exercise, does not apply. See Great Northern R.R. v. Merchants Elevator Co., 259 U.S. 285 (1922). Although much was made about Wanda's theory that David was risking his disability benefits by truck driving on the side, the superior court admitted that it considered David's trucking activities irrelevant to the overall issues. (RP III at 18.) The superior court was therefore not engaged in a purely interpretative

process excusing use of Railroad Retirement Board authority and expertise. The superior court was engaged in an extensive fact-finding process in which numerous findings were made. (CP 97.) It was not at liberty to make an independent interpretation of 45 U.S.C. § 231m--particularly and interpretation for which there is no authority.

But even more fundamentally, the superior court is clearly in error in its determination of David's retirement status when the correct federal law is applied. The undisputed testimony of Ms. Freres, the Railroad Retirement Board employee, conclusively establishes that the amount and type of benefits that David could receive would remain constant whether his retirement was considered to be based on disability or longevity. (RP 81.) The

superior court admitted in its oral opinion that analysis of David's retirement under the Railroad Retirement Act would compel a different conclusion from the court's analysis:

> I know Mrs. [Freres] said that it makes no difference, that a medical disability pension becomes a disability pension and is the same as a regular pension. From the Railroad Retirement Act standpoint it is, but that is not what we're talking about. We're talking about the intent of the parties when they contracted.

(RP 81-82.) (emphasis added). Yet, the court nevertheless reached a result, that by its own admission, was incompatible with federal law.

The superior court, by substituting its own interpretation of the law for federal law, violates the commandments of 45 U.S.C. § 231m and the Railroad Retirement Act, as amended. Distinguishing the

federal statute by arguing that federal law is irrelevant to determining the meaning of a contract between the parties should not avail the superior court.

> It is the general rule that parties are presumed to contract with reference to existing statutes (In re Estate of Clise, 64 Wn. 2d 310, 391 P.2d 547 (1964); Caruthers v. Sunnyside Valley Irrigation Dist., 29 Wn. 2d 530, 188 P.2d 136 (1947)), and a statute which affects the subject matter of a contract is incorporated into and becomes a part thereof. Dopps v. Alderman, 12 Wn. 2d 268, 273-74, 121 P.2d 388 (1942). If the parties to a contract wish to provide for other legal principles to govern their contractual relationship, they must be expressly set forth in the contract. Absent a clear intent to the contrary disclosed by the contract, the general law will govern. See Jenkins v. Morgan, 100 Ga. App. 561, 112 S.E.2d 23 (1959); Poole & Kent Corp. v. C.E. Thurston & Sons, Inc., 286 N.C. 121, 209 S.E.2d 450 (1974).

Wagner v. Wagner, 95 Wash. 2d 94, 98-99, 621 P.2d 1279 (1980). While it is true

that contract interpretation is, strictly speaking, a pure question of state law, a state court should not be free to interpret federal law in a manner that frustrates the essential purpose of that law. In this case, the weight of authority agrees that the purpose behind section 231m is to prevent the division of Tier I funds.

The existing statute, for contract interpretation purposes, is the Railroad Retirement Act and, specifically, 45 U.S.C. § 231m. The record is devoid of any indication that the "Separate Agreement" was intended to be at variance with the Railroad Retirement Act. The superior court's interpretation of the "Separate Agreement" renders it meaningless by concluding that David and Wanda were contracting to waive Wanda's rights to David's Tier I benefits--rights Wanda

never had under federal law. At the bottom line, the superior court is using the Tier I payments Wanda was once receiving to justify her continued receipt of a portion of David's Tier II benefits. That is contrary to federal law and violates the Supremacy Clause.

CONCLUSION

This Court should grant this petition for a writ of certiorari. The Superior Court of the State of Washington, Clark County, has created a very novel interpretation of the Railroad Retirement Act that directly contradicts existing statute and precedent. With the Roark decision, the State of Washington is the only jurisdiction that holds that Tier I benefits may be considered in the distribution of the property of the parties to a divorce. Washington's deviation from established

precedent clear meets the requirement of Supreme Court Rule 10.1(b) for granting a writ of certiorari. But more importantly, a writ of certiorari is necessary from this Court to protect the interests of railroad retirees in Washington from the predations of state law that seeks to undermine the Railroad Retirement Act.

DATED: October 25, 1994

Respectfully submitted,

MAXEY LAW OFFICES, P.S.

DENNIS C. CRONIN
Counsel of Record

JOHN M. COOPER
Co-Counsel for Petitioner

APPENDIX

I. OPINIONS BELOW

A-1 to A-9: Ruling Affirming Judgment, No. 15502-8-II (Wash. App. December 14, 1993)

A-10: Order Denying Appellant's Motion to Modify, No. 15502-8-II (Wash. App. February 7, 1994)

A-11: Order (Denying Review), No. 61599-3 (Wash. July 27, 1994)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Marriage of:	NO. 15502-8-II
WANDA LUCILLE ELFORD, Respondent, and DAVID GENE ELFORD, Appellant.	RULING AFFIRMING JUDGMENT

David Gene Elford[1] appeals, pro se, a Clark County Superior Court Judgment which determined that Wanda Lucille Elford was entitled to continue to receive one-half of certain Railroad Retirement Benefits. Wanda filed a motion on the merits. RAP 18.14(e)(1). Wanda's Motion to Permit Late Filing of Financial Declaration was considered concomitantly.

The principal claim of error in David's appeal deals with the superior court's decision that Wanda is entitled to continue to receive a portion of David's railroad retirement. Some terminology is necessary to an understanding of the is-

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[1]To help in identification, the parties will be identified by first name.

sues and the court's decision. Railroad retirement benefits, a form of federal statutory grant rather than a pension plan, are authorized by the Railroad Retirement Act, 45 U.S.C. § 201 *et seq.* There are two types of benefits known as Tier I and Tier II. Tier I benefits are paid for temporary disability. Tier II benefits are paid for permanent disability or upon reaching a certain retirement age. Tier I benefits are not divisible in divorce, Tier II benefits are divisible.[2] The term "medical retirement" is not an official term, but staff use it when dealing with the public to mean somebody is retiring for reasons of health, rather than for age.

David and Wanda divorced in 1983. David worked for the Burlington Northern Railroad during all the years of their marriage. In 1980, David retired under a Tier I disability retirement. He was otherwise eligible for Tier II benefits in 1988.

In the 1983 divorce, Wanda received one-half of David's retirement "as a result of his Railroad Retirement Pension". In 1985, Wanda and David entered into a

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[2]Tier I benefits, although not divisible, can be considered as one of the economic circumstances of the parties in making an equitable distribution of community assets. *Marriage of Roark*, 34 Wn. App. 252, 254 (1983).

separate agreement in which Wanda relinquished "any and all claims to half of David G. Elford's medical retirement". David gave valuable consideration for the 1985 relinquishment.

As previously noted, near the end of 1988, David became entitled to, and began to receive, permanent, Tier II retirement benefits. In 1991, Wanda contacted the Railroad Retirement Board and asked when she would start receiving her share of the permanent retirement benefits. For the first time, she learned of Tier I and Tier II benefits and her entitlement to Tier II benefits. She discovered that the Board was paying all retirement benefits to David. Thereafter, the Board then began to distribute to Wanda one half of the Tier II benefits, or approximately $151 per month.

David filed a motion to modify the dissolution. He claimed that Wanda had relinquished her rights to any and all of his retirement benefits. Following trial on September 16, 1991, the court ruled in Wanda's favor. The court determined that Wand had given up her right to Tier I benefits, but had not given up, and was stilled entitled to, one half of the Tier II benefits. The trial court explained at a subsequent hearing that it felt that neither David nor Wanda knew about Tier II, and therefore could not have struck a bargain about something they had not known about.

David opposed entry of the Findings of Fact and Conclusion of Law and Award of Attorney Fees, and requested admission of additional testimony and evidence. On October 25, 1991, after several continuances and a change of counsel for David, the court held a hearing on these matters. The court entered the Findings of Fact and Conclusions of Law as proposed by Wanda, found no grounds for CR 59 relief, and denied David's motion for reconsideration. David's Notice of Appeal was timely filed.

Wanda asserts, in her Motion on Merits, that David's appeal is basically an attack on the credibility of the witnesses, attacks on the attorneys, and on the trial court's discretionary decisions, including trial court's decision to award attorney fees to Wanda and not to grant CR 59 relief. Her assertion is correct. The appeal is clearly without merit.

David has not assigned error to any of the trial court's findings and Wanda contends that they should therefore be considered verities on appeal. RAP 10.4(c); *Marriage of Ambrose*, 67 Wn. App. 103, 105 (1992). Technically, Wanda is correct. However, David does list those findings to which he objects in his notice of appeal. Moreover, the body of David's brief indicates a challenge to selected findings of fact.

Regardless, review of challenged findings of fact is limited to determining whether they are supported by any substan-

tial evidence, without regard to other reasonable interpretations which could be made from the record. *Xieng v. Peoples Nat'l Bank*, 63 Wn. App. 572, 581 (1991), *aff'd*, 120 Wn. 2d 512 (1993); *Marriage of Zeigler*, 69 Wn. App. 602, 608 (1993). David has not met his burden of demonstrating that the challenged findings are not supported by substantial evidence. *Nordstrom Credit v. Dept. of Revenue*, 120 Wn. 2d 935, 939-40 (1993).

The foundation of David's argument is that, according to the 1985 agreement, David was to receive ***all*** of his retirement benefits. In interpreting contracts, it is the trial court's duty to declare the meaning of what is written, and not what was intended to be written. *Syrovy v. Alpine Resource*, 122 Wn. 2d 544, 551 (1993). The reviewing court may not usurp the functions of the judge and reverse the judgment because the weight of testimony seems to be on the other side, or because the judge believed some witnesses and disbelieved some others. *Xieng v. Peoples Nat'l Bank*, 63 Wn. App. 572, 581 (1991), *aff'd*, 120 Wn. 2d 512 (1993).

David contends that the trial court erred in finding that there were two types of retirement, which were to be distributed separately. Little or none of David's statement of the facts in his brief and reply brief are referenced to the record, contrary to RAP 10.3(4), (7) and *Harbison v. Gardne Vly. Outfitters*, 69 Wn. App.

590, 594 (1993). In any event, the record supports the court's finding that neither party was aware of the existence of Tier II benefits. RP 31, 48-49, 56, 58. David, in fact, testified that he and Wanda thought that disability retirement and normal retirement were one and the same.

The record also supports the finding that when David and Wanda agreed to divide David's retirement benefits, they agreed only to divide the benefits that David was currently receiving, and that these were the only benefits of which they had been aware. Wanda signed the 1985 agreement because she thought that the medical retirement was temporary, lasting only enough for David to rehabilitate himself. David himself testified that Wanda agreed to give up any and all cliam to David's *medical retirement*. David's testified to his understanding at the time: that Wanda was giving up all interest in his retirement benefits. Wanda's understanding was that in the 1985 agreement, she gave up the right to David's medical retirement, but not to all of David's retirement benefits. Her testimony was that she thought she was just giving up the right to temporary, medical benefits, but that she still believed that she would receive something when David reached the right age for railroad retirement. The trial court was entitled to believe Wanda's version of events, rather than David's. *Xieng v. Peoples Nat'l Bank*, 63 Wn. App. at 581.

David relies in part on a release thta the trial court declined to consider at the October 25, 1991, hearing. He now attempts to rely on it on appeal. An appellate court will not accept additional evidence on appeal unless all six criteria of RAP 9.11(a) are satisfied. RAP 9.11(a); *Harbison v. Gardn Vly. Outfitters*, 69 Wn. App. at 593-94. David does not meet all six criteria of RAP 9.11. This same release was offered to the trial court on motion for reconsideration, and rejected because the release did not enter into the 1985 negotiations or contract.

Wanda also argues that David's motion for post-trial relief was based on Civil Rule 59(a)(4) (newly discovered evidence) and CR 59(a)(9) (substantial justice not done). She contends that David's arguments regarding other parts of CR 59 (such as accident or surprise), were not preserved before the trial court and should therefore not be considered on appeal. *Washburn v. Beatt Equipment Co.*, 120 Wn. 2d 246, 289 (1992). Wanda's contention has merit. In his "Objection to Entry of Findings and Conclusions of Law" and request for reconsideration, David did rely on CR 59(a)(4) and (9). However, in his appeal, David attempts to rely on numerous statutes, civil rules, and evidence rules, none of which were brought forth before the trial court.

David attempts to raise and argue additional new issues in his reply brief,

such as raising a concern that he and Wanda were both represented by one attorney in their original dissolution, and positing suspicion about the fact that Wanda waited until 1991 to check on when she was to begin receiving benefits. Issues first raised in a reply brief will not be considered. *In re Marriage of Sacco*, 114 Wn. 2d 1, 5 (1990).

David challenges the award of attorney fees by the trial court. RCW 26.09.140. The decision to award attorney fees lies within the sound discretion of the trial court, and will not be overturned absent a showing of an abuse of discretion. *Marriage of Zeigler*, 69 Wn. App. 602, 609 (1993). The record supports the trial court's finding of need on the part of Wanda. There is, therefore, a tenable basis on which to predicate the award of $2000 in attorney fees. Daivd offers nothing, of record, to demonstrate an abuse of discretion on the part of trial court.

Wanda seeks attorney fees on appeal. She moves the court permit a late filing of her financial data supporting her request for an award. Her request should be granted in light of the fact that David has had ample time to respond on the issue of attorney fees on appeal.

Similar to the trial court, this court, in it discretion, may award attorney's fees on appeal. RCW 26.09.140. In exercising this court's discretion, the

arguable merit of the appeal and the financial resources of the respective partis is considered. *Marriage of King*, 66 Wn. App. 134, 139 (1992). David's appeal is clearly without merit and borders on being frivolous. Wanda has demonstrated financial need. David did not submit contravening affidavits nor challenge the amount requested. *See, Marriage of Sandborn*, 55 Wn. App. 124, 130-31 (1989).

Although counsel filed an affidavit of fees, RAP 18.1(c), it appears that the affidavit contains some matters not pertaining to the appeal. Although an award of fees is warranted, counsel shall filed a revised affidavit limited solely to fees generated in defense of the appeal. Accordingly, it is hereby

ORDERED that the judgment is affirmed. It is

FURTHER ORDERED that Wanda Elford is awarded reasonable attorney fees on appeal. Counsel shall, within 10 days of this order, file and serve a revised affidavit of fees. David Elford shall have 10 days from the date the affidavit is served to file an objection.

DATED this 14th day of December, 1993

/s/
Court Commissioner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Marriage of:	}	NO. 15502-8-II
WANDA LUCILLE ELFORD, Respondent, and DAVID GENE ELFORD, Appellant.	}	ORDER DENYING APPELLANT'S MOTION TO MODIFY

THE APPELLANT has filed a motion to modify Commissioner ruling in the above-entitled matter. After consideration, the court has determined that the motion should be denied. Accordingly, it is

SO ORDERED.

DATED this 7th day of February, 1994

FOR THE COURT:

/S/
ACTING CHIEF JUDGE

IN THE SUPREME COURT OF WASHINGTON

	NO. 61599-3
In re the Marriage of:	ORDER
	C/A NO. 15502-8-II
WANDA LUCILLE ELFORD, Respondent,	
and	
DAVID GENE ELFORD, Petitioner.	

This matter came before a Department of the Court on its July 27, 1994, Motion Calendar on Petition for Review and Respondent's Motion for Attorney Fees. The Department having considered the Petition, motion and the files herein, and the five member of the Department having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied and the motion for attorney fees is denied.

DATED at Olympia, Washington this 27th day of July, 1994

/S/
CHIEF JUSTICE